

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

November 6, 2007 Session

**JEFFERSON C. PENNINGTON III and DAN ALAN GOOSTREE v.  
BOUNDRY, INC.; SOUTH STREET, INC.; CHUMI, LLC; LEWIS  
INVESTMENT CO., INC.; and JAMES A. LEWIS  
and  
BRADFORD JASON LEWIS, GINGER LEWIS DOLLARHIDE, and  
JAMES BRYAN LEWIS v. BOUNDRY, INC.; SOUTH STREET, INC.; and  
JEFFERSON C. PENNINGTON III**

**Appeal from the Chancery Court for Davidson County  
Nos. 05-406-III and 05-785-III Richard H. Dinkins, Chancellor**

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**No. M2006-02650-COA-R3-CV - Filed May 1, 2008**

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This appeal involves the fees awarded to a special master. In the underlying litigation, shareholders in two corporations and members in a limited liability company filed a lawsuit seeking dissolution of the entities. The trial court appointed a special master to investigate facts pertinent to judicial dissolution and intervention to prevent future losses. The special master's investigation included reviewing shareholder voting agreements and other legal documents. During the course of the investigation, the special master acted as a mediator and conducted settlement discussions. After filing his report with the trial court, the special master applied for approval of his fees. Some of the parties objected to the fees, but the trial court nevertheless approved the fee application. Several parties appeal, arguing *inter alia* that the trial court approved an excessive hourly rate and awarded fees for services that were outside the scope of the order of reference. We find that the special master's mediation efforts were outside the scope of the special master's authority, and reverse the fee award for those activities. The remainder of the trial court's decision is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part,  
Reversed in Part, and Remanded for Further Proceedings**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ANDY D. BENNETT, J., and JON KERRY BLACKWOOD, SR. J., joined.

Paul T. Housch, Nashville, Tennessee, for Plaintiffs/Appellants Bradford Jason Lewis; Ginger Lewis Dollarhide; James Bryan Lewis; and Defendants/Appellants Lewis Investment Co., Inc. and James A. Lewis

John L. Chambers, Nashville, Tennessee, Special Master/Appellee, pro se

**OPINION**

This appeal involves complex underlying litigation regarding three Nashville restaurants, and the ensuing award of fees to the Special Master appointed by the trial court. First, we set out the various parties and their intertwined business relationships in the underlying litigation. We then outline the facts regarding the Special Master.

### **FACTS AND PROCEEDINGS BELOW**

Defendant/Appellee South Street, Inc. (“South Street”) is a Tennessee corporation that owns and operates the South Street restaurant. Defendant/Appellee Boundry, Inc. (“Boundry”) is a Tennessee corporation that owns and operates the Bound’ry restaurant.<sup>1</sup> Defendant/Appellee Chumi, LLC (“Chumi”) is a Tennessee limited liability company that operated the restaurant known as “Chu.” The three restaurants were located in adjacent buildings on 20th Avenue South in Nashville, Tennessee. The three adjacent buildings are owned by Defendant/Appellee Lewis Investment Co., Inc. (“Lewis Investments”). Defendant/Appellee James A. Lewis (“James Lewis”) owns all of the voting stock in Lewis Investments, and is one of its three directors.

At the time the underlying lawsuit was filed, Plaintiffs/Appellants Jefferson C. Pennington III (“Pennington”) and Dan Alan Goostree (“Goostree”) were shareholders of both South Street and Boundry.<sup>2</sup> South Street and Boundry had the same shareholders, including Pennington, Goostree, and three other individuals. In addition, Pennington and Goostree were both members of Chumi. Pennington was also the President and Director of Operations for both South Street and Boundry and a manager for Chumi. James Lewis was a member and a manager of Chumi, and was a director for both Boundry and South Street. He held no shares in either Boundry or South Street directly.

On January 1, 2001, the shareholders of both South Street and Boundry entered into shareholder voting agreements. On the same day, South Street and Boundry both entered into lease agreements with Lewis Investments for the buildings that housed the restaurants. Boundry, South Street, and the shareholders for both corporations signed two unconditional cross-guaranties of the lease agreements.<sup>3</sup>

On December 16, 2003, the members of Chumi entered into a voting agreement. Chumi then entered into a lease agreement with Lewis Investments. On the same date, South Street, Boundry, and Lewis Investments executed amendments to their respective lease agreements; under the

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<sup>1</sup>It appears that the restaurant is called “Bound’ry” while the corporation is simply “Boundry,” without the apostrophe.

<sup>2</sup>At the time the complaint was filed, Boundry had five shareholders: Pennington (45%), Goostree (10%), James Bryan Lewis (19%), Bradford Jason Lewis (13%), and Ginger Lewis Dollarhide (13%). South Street had the same five shareholders, but with different percentage interests: Pennington (45%), Goostree (10%), James Bryan Lewis (15.66%), Bradford Jason Lewis (14.67%), and Ginger Lewis Dollarhide (14.67%). Chumi had six members: Pennington (45%), Goostree (5%), James Bryan Lewis (25%), Bradford Jason Lewis (5%), Ginger Lewis Dollarhide (5%), and James A. Lewis (15%). James Bryan Lewis, Bradford Jason Lewis, and Ginger Lewis Dollarhide are the children of James A. Lewis.

<sup>3</sup>Goostree did not sign either of the guaranty agreements.

amendments, any default under the Chumi lease agreement would become a default under both the Boundry and South Street lease agreements.

After the South Street and Boundry restaurants had been in operation for some time, the individuals behind those restaurants decided to open the Chu restaurant. Opening Chu on the target date in 2004 required extensive renovation of the building which was to house the restaurant. Under the lease agreement between Chumi and Lewis Investments, Lewis Investments was supposed to make improvements to the building. To fund the improvements, Chumi incurred bank debt. Unfortunately, the Chu restaurant was not successful, and closed in January 2005.

Later in 2005, James Lewis proffered to each member of Chumi a proposed promissory note in favor of Lewis Investments in the amount of \$700,000, purportedly representing the amount that Lewis Investments had spent renovating the building that housed the Chu restaurant. Pennington and Goostree both refused to sign the proposed promissory note, demanding documentation of the renovation expenditures.<sup>4</sup>

On December 21, 2004, Lewis Investments declared Chumi to be in default for failure to pay its rent. By virtue of the cross-default provisions in the amendments to the South Street and Boundry lease agreements, Lewis Investments also declared South Street and Boundry to be in default under their respective agreements.

These defaults resulted in multiple lawsuits filed in rapid succession. On January 27, 2005, the shareholders and members of Boundry, South Street, and Chumi held a meeting. At the meeting, James Bryan Lewis ("Bryan Lewis"), a shareholder in both corporations and a member of Chumi, sought to remove Pennington as the director of operations for the corporations. Several days later, on January 31, 2005, Lewis Investments filed a detainer warrant and complaint for damages against Chumi in Davidson County General Sessions Court. Shortly thereafter, on February 9, 2005, Lewis Investments filed detainer warrants and General Sessions lawsuits against South Street and Boundry as well.

On February 11, 2005, Pennington and Goostree ("Pennington Group") filed a lawsuit in Davidson County Chancery Court against Boundry, South Street, Chumi, Lewis Investments, and James Lewis. In the complaint, they sought judicial dissolution of the companies and the appointment of a custodian to preserve the companies' assets.<sup>5</sup> In addition, they sought damages for

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<sup>4</sup> Pennington and Goostree maintain that they never received documentation of the renovation expenditures.

<sup>5</sup> The lawsuit sought dissolution pursuant to Tennessee Code Annotated §§ 48-24-301 and 48-24-901. Section 48-24-301 governs dissolution of a corporation. It states:

Any court of record with proper venue in accordance with § 48-24-302 may dissolve a corporation:

...

(2) In a proceeding by a shareholder if it is established that:

(A) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened

(continued...)

James Lewis' alleged breach of his fiduciary duty to South Street, Boundry, and Chumi. Finally, they requested injunctive relief to prevent South Street, Boundry, and Chumi from dissipating or encumbering the companies' assets, and to prevent James Lewis and Lewis Investments from prosecuting the detainer warrant. In its response to the application for injunctive relief, Lewis Investments argued that the Chancery Court was without jurisdiction to grant the requested relief, that Chumi, South Street, and Boundry had no valid defense to the detainer warrants, and that the Pennington Group was without authority to act on behalf of the companies.

On March 3, 2005, the Chancery Court held a hearing on the Pennington Group's request for injunctive relief and its application for the appointment of a custodian. In light of the evidence that the Pennington Group would suffer immediate and irreparable harm, the Chancery Court enjoined the prosecution of the detainer warrants pending against the three companies. The Chancellor also appointed John Chambers ("Chambers")<sup>6</sup> as a Special Master pursuant to Rule 53 of the Tennessee Rules of Civil Procedure, and stated in its Order of Reference:

The Court then considered the Plaintiff's claim for appointment of a custodian or director for the corporations. The Court noted that under both the corporate and limited liability company statutes the Court did have some authority in that regard but that on the record did not believe that threshold had been met. The Court further ruled, based on its own motion, that it would appoint a person under the provisions of Rule 53 of the Rules of Civil Procedure as a master to investigate and report whether the requirements of T.C.A. 48-24-301(2)(A), (B) or (D) and/or the requirements of T.C.A. 48-245-901 et seq have been met. The Court made suggestions and the parties offered suggestions for the appropriate person to serve as master and the Court ordered that John Chambers, Esq. be appointed as master. The Court stated that it desired the master further advise the Court on the necessity of judicial action to prevent future loss to the entities or the parties. The Court charged that the master should present his report before the end of March, 2005, given the impending loan due dates that were represented to the Court as being due in April of

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<sup>5</sup>(...continued)

or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;

(B) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent;

...

(D) The corporate assets are being misapplied or wasted;

T.C.A. § 48-24-301(2) (2002). Section 48-245-901 governs dissolution of an LLC. It states:

A court may grant any equitable relief it considers just and reasonable in the circumstances or may dissolve an LLC and/or direct that the dissolved entity be merged into another or new LLC or other entity on terms and conditions the court deems equitable.

T.C.A. § 48-245-901 (2002).

<sup>6</sup>Chambers is an attorney practicing corporate law in Nashville, Tennessee.

2005. The Court further ordered that the parties fully cooperate with the Master and provide him with any and all information requested and provide him full access to all the books and records of Boundry, Inc., South Street, Inc. and Chumi, LLC, or any divisions or affiliates thereof, necessary for him to do his investigation and do his report. The Court further enjoined the parties to participate in the master's investigation and to also make themselves available to be interviewed by the master. The Court further noted there was evidence presented that certain tapes had been made of the January 27, 2005 board meetings and the Court ordered the parties to make the tapes available to the master. The Court also noted that one of the things the master would report back on would be the furniture, equipment, fixtures, and leasehold improvements in the Chumi space.

Thus, the Chancery Court declined to appoint a custodian, as requested, but instead appointed Chambers as Special Master to determine whether the statutory requirements for dissolution had been met, and whether judicial action was necessary to prevent future losses. The Special Master was directed to report to the Chancery Court by the end of March 2005.

After his appointment, Chambers began reviewing the voluminous documents and researching the issues. Shortly after that, he engaged in discussions with the parties about his acting in the role of a mediator to attempt to broker a resolution of the disputes.

Thereafter, on March 29, 2005, two other shareholders/members in the companies, Bradford Jason Lewis ("Bradford Lewis") and Ginger Lewis Dollarhide ("Dollarhide"), filed a separate lawsuit in the Chancery Court against South Street, Boundry, and Pennington. This group of plaintiffs will be referred to collectively as the "Lewis Group." Similar to the lawsuit filed by the Pennington Group, the Lewis Group sought judicial dissolution of Boundry and South Street, and the appointment of a custodian *pendente lite*. The Lewis Group also sought an accounting from Pennington and injunctive relief against Pennington.

Chambers continued to review the numerous documents, research the issues, and interview persons involved in the litigation. He also continued to expend considerable time attempting to mediate a settlement. Chambers' report as Special Master was not filed by the end of March 2005, as set forth in the Chancery Court's order of reference. Pursuant to a series of agreed orders, the deadline for the Special Master's report was extended several times, ultimately to May 9, 2005. Still, however, the report remained pending.

On June 29, 2005, the Lewis Group filed a motion to consolidate its lawsuit with the lawsuit instituted by the Pennington Group. This motion was granted.

On July 7, 2005, the Lewis Group filed a motion to add shareholder/member Bryan Lewis as an additional plaintiff. On the same date, the Lewis Group filed a motion to require Chambers to file his Special Master's report. The Lewis Group particularly objected to Pennington's continued control, and on July 15, 2005, it filed a motion to remove Pennington as President and Director of Operations for South Street and Boundry. The motion to add Bryan Lewis as a plaintiff was granted, and the other motions were set for hearing.

After a hearing, the Chancery Court entered an order on August 5, 2005, directing the Special Master to file his report within ten days. The remainder of the request for relief was denied.

Chambers filed his Special Master's report with the Chancery Court on August 16, 2005. The report, nearly thirty pages long, discussed both the governing law and Chambers' findings and recommendations. Chambers concluded that the requirements for judicial dissolution of Boundry and South Street, under Tennessee Code Annotated § 48-24-301(2)(A), (B), and/or (C), had not been met. As to Chumi, he found that the requirements for judicial dissolution of an LLC under Tennessee Code Annotated § 48-245-901 had been met. Accordingly, Chambers recommended dismissal of the consolidated actions insofar as they sought dissolution of Boundry and South Street, and the appointment of a receiver for the purpose of dissolving and winding up the affairs of Chumi. Chambers opined that there was no reason for the court to interfere in the affairs of Boundry and South Street. In addition to investigating the grounds for dissolution and winding up, Chambers reported that he "expended significant time, particularly in May and June of 2005, in facilitating discussions between the parties regarding possible private resolution of their differences." Chambers asserted that this was done "at the request of all of the parties."

The Lewis Group and Defendants James Lewis and Lewis Investments filed objections to the Special Master's report. They asserted, *inter alia*, that the report was untimely, that the Special Master misapplied the relevant statutory provisions, and that the Special Master went outside the scope of the order of reference, in particular, by finding that the cross-default provisions in the lease agreements were ineffectual and non-binding.

On February 17, 2006, Chambers filed with the Chancery Court an application for fees and expenses and a motion for approval of his application. The total fees and expenses in the application totaled \$77,881.67. Of this total, \$72,345.00 consisted of 222.6 hours of Chambers' time, billed at \$325 per hour. The balance consisted of fees for work by junior attorneys and paralegals who assisted Chambers, as well as various expenses. In his application, Chambers asserted:

At the request of the parties and/or their counsel, in April, May and June the Master additionally acted as a facilitator/informal mediator in an attempt to assist the parties in reaching an agreed resolution of their differences. Counsel for all of the individual parties in these consolidated proceedings participated in these discussions including those now objecting to the mediation efforts and the *ex parte* nature of some of the contacts and interviews.

Chambers added: "At no time during the April through June period did any party object to the informal mediation; at all times all parties and their counsel (in the view of the Master) fully cooperated." In his motion for approval of the application, Chambers asked that the fees and expenses be taxed jointly and severally against all of the parties involved in the litigation.

On February 24, 2006, the Lewis Group filed a response opposing Chambers' application for fees and expenses. They argued that Chambers' hourly rate was excessive, and that his overall fee was excessive. They also asserted that Chambers went beyond the authority given to him in the

order of reference by assuming the role of an informal mediator and facilitator, and that they should not be charged fees for the time that Chambers spent acting in that capacity.

James Lewis and Lewis Investments filed a similar response in opposition to Chambers' fee application, in which they incorporated by reference the Lewis Group's response, and raised additional objections as well. As an additional objection, they asserted that they asked Chambers to terminate the mediation efforts and file his report, but that Chambers declined to do so. They also challenged Chambers' suggestion that the fees and expenses be assessed jointly and severally against all of the parties.

Chambers responded to the objections, maintaining that his fee was "more than reasonable" considering the type of proceeding involved and his extensive experience in the area of corporate law. In support, Chambers filed his own affidavit to that effect. He did not respond to the allegations that he exceeded the authority given him in the order of reference.

Thereafter, on April 7, 2006, the Lewis Group filed a supplemental response in opposition to Chambers' application for fees and expenses. In this supplemental response, the Lewis Group pointed out that they did not file their complaint until March 29, 2005, and that their lawsuit was not consolidated with the Pennington Group's lawsuit until July 29, 2005. In light of this fact, they argued that they should not be charged Special Master fees or expenses incurred prior to July 29, 2005, or after August 16, 2005, the date on which the Special Master's report was filed. Moreover, they argued that the Special Master insufficiently described many of his services in his fee application, such as multiple entries for "attention to report," and maintained that they should not have to pay for such vaguely described services. Finally, the Lewis Group argued that the Special Master's time spent determining the validity of the voting agreements, leases, and guaranties was not authorized in the order of reference. In support of the Lewis Group's response, they filed the affidavit of Plaintiff/Appellant Bryan Lewis, a practicing Nashville attorney, who opined that Chambers' hourly rate was excessive, and contended that Chambers should be paid no more than the \$150 to \$200 rate normally charged by guardians ad litem, special masters, and attorneys ad litem in Davidson County.

On April 18, 2006, all of the parties involved in the consolidated action formally agreed to mediate their disputes. On June 20, 2006, the Chancery Court entered an agreed order of dismissal. The only matter that remained for adjudication was the amount to be paid to Chambers for his services as a Special Master. Toward that end, the parties deposited \$85,000 with the Chancery Court to be used to pay Chambers' fee when the amount was determined.

On July 21, 2006, Chambers filed a further response to the Lewis Group's supplemental objections to his application for fees. In response to the Lewis Group's argument that they should not be charged for his services rendered prior to the consolidation of the cases, Chambers asserted that all of the parties, including the Lewis Group, participated in the investigation and benefitted from the services, despite the fact that the cases had not yet been consolidated. As to the argument that Chambers did not sufficiently describe some of his activities, he maintained that a further breakdown of his activities was impracticable. Finally, regarding the argument that Chambers was not authorized to spend time determining the validity of the voting agreements, leases, and

guaranties, Chambers asserted that such activities were, directly or indirectly, related to a determination of whether the parties were deadlocked, a factor pertinent to judicial dissolution.

In response to the challenge to his hourly rate, Chambers filed the affidavits of Nashville attorneys Thomas Sherrard and Frank Grace. Both opined that, in light of Chambers' experience and skill in business related matters, his claimed hourly rate was customary, reasonable, and commensurate with the norms for Nashville attorneys. Shortly thereafter, on July 26, 2006, Chambers filed a supplemental application for fees and expenses, seeking additional fees and expenses of \$6,660, which total represented fees and expenses incurred between January 1, 2006 and July 30, 2006. The Lewis Group objected, asserting that Chambers' supplemental application was done in retaliation for their objections to his first application for fees and expenses.

The Chancery Court held a hearing on Chambers' fee application and issued its ruling on November 6, 2006.

As to Chambers' hourly rate, the Chancery Court found that a commercial attorney rate was not appropriate, but also found that the rate charged by court-appointed officers for less complex chancery matters was also not appropriate. Accordingly, the Chancellor struck a compromise between Chambers' requested rate of \$325 and the \$150 rate advocated by the objecting parties, and set the hourly rate at \$275 for services performed in 2005 and \$285 for those performed in 2006. In doing so, the Chancery Court relied on the ten factors set forth in Rule 1.5 of the Rules of Professional Conduct, which are used to determine the reasonableness of a lawyer's fee, reasoning that these factors, with "some modification," were appropriate because Rule 53 offers little guidance in setting a special master's fee. *See* Tenn. Sup. Ct. R. 8, R. of Prof'l Conduct 1.5(a) ("R.P.C. 1.5(a)"). The Chancery Court also considered "the personalities and expertise of the people involved," as well as the "level of acrimony and antagonism" among the parties.

The Chancery Court next addressed the objection that Chambers, by acting as a mediator to attempt to facilitate a settlement, performed services outside the scope of the order of reference. The Chancery Court stated, "I would be hard-pressed to, in effect sanction [Chambers] for that, not only because the parties participated without objection, but that is a preferable way of proceeding, particularly in light of the issues, the acrimony that the parties demonstrated . . . ." Accordingly, this objection was overruled and Chambers was awarded the fee for his mediation services.

The Chancery Court concluded that Chambers had adequately described his services in his fee application. In addition, it found that Chambers' time spent determining the validity of the voting agreements, leases, and guaranties was within the parameters of his charge in the order of reference, holding that these matters were "inherent in the initial reference of matters to the master," and that the time spent on these activities was reasonable. Finally, the Chancellor ruled that the Lewis Group should not be responsible for fees for services rendered prior to March 29, 2005, the date on which they filed their lawsuit.

In the Chancery Court's order, entered on November 22, 2006, Chambers was awarded a total fee of \$70,124.08. Out of this total, the Pennington Group was ordered to pay \$35,062.09, and James Lewis, Lewis Investments and the Lewis Group were ordered to pay the balance. As among



James Lewis, Lewis Investments and the Lewis Group, the Lewis Group was ordered to pay \$12,198.50 out of the total because they did not file their lawsuit until March 29, 2005. On December 1, 2006, the Lewis Group, James Lewis, and Lewis Investments (hereafter the “Lewis Appellants”) filed a notice of appeal.<sup>7</sup>

### ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, the Lewis Appellants challenge the reasonableness of the Special Master fee they were ordered to pay, raising three issues. They assert that the Chancery Court erred by (1) using an excessive hourly rate to determine the fee amount, (2) awarding fees for services not sufficiently described, and (3) awarding fees for services performed that were beyond the scope of the order of reference.

We review the Chancery Court’s factual findings *de novo* on the record with a presumption of correctness, “unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13(d); *Union Carbide v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court’s determination of the reasonableness of a special master’s fee is reviewed for an abuse of discretion. *Nguyen v. Hart*, No. 03A01-9302-CH-00058, 1993 WL 291411, at \*4 (Tenn. Ct. App. July 29, 1993); *W.B. Hunt v. Temco, Inc.*, 452 S.W.2d 879, 894 (Tenn. Ct. App. 1969). In reviewing the lower court’s decision for an abuse of discretion, we look at whether the evidence in the record supports the factual basis of the court’s decision, whether the court correctly applied the relevant legal principles, and whether its decision falls “within the range of acceptable alternatives.” *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000).

### ANALYSIS

A special master is defined as a “parajudicial officer . . . appointed to assist the court with a particular matter or case.” BLACK’S LAW DICTIONARY 989-90 (7<sup>th</sup> Ed. 1999). The function of a Special Master is more fully explained in GIBSON’S SUITS IN CHANCERY:

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<sup>7</sup>Because the Pennington Group did not object to Chambers’ fee application, the Chancery Court ordered disbursement of the Pennington Group’s share of the fees and expenses. Noting that the Lewis Group, James Lewis, and Lewis Investments did not object to payment of the Special Master’s expenses, the Court also ordered disbursement of the unpaid portion of Chambers’ expenses, a total of \$643.33. The remaining deposited funds were ordered to be retained by the Clerk and Master.

On December 18, Pennington, appearing pro se, filed a notice of appeal and a motion to stay execution pending appeal. Pennington also filed a motion to alter or amend the Chancery Court’s December 8 order of disbursement of fees and expenses. The Chancery Court granted Pennington’s motion to stay execution of the judgment, effectively setting aside the order of disbursement as to the Pennington Group’s share of the fees and expenses.

Thereafter, Chambers filed a motion in this Court to dismiss Pennington’s appeal. Chambers argued that Pennington had not raised his objections to Chambers’ fee application in a timely manner, and, accordingly, that he had not complied with Rule 36 of the Tennessee Rules of Appellate Procedure. *See* Tenn. R. App. P. 36(a). Chambers’ motion to dismiss Pennington’s appeal was granted on this basis. Goostree never appealed the Chancery Court’s order. Accordingly, the only Special Master fees at issue in this appeal are those paid by the Lewis Appellants: approximately \$35,000.

There are often . . . inquiries to be made during the pendency of an action, or . . . special ministerial acts to be performed, or . . . other matters to be attended to, which require highly specialized skill. If the Chancellor was obliged to attend to all of these matters of inquiry and detail, the sessions of the Court would be greatly prolonged, and the number of Chancellors would have to be greatly increased. To remedy this difficulty, and enable the Chancellor to devote his time to the finding and adjudication of other matters in litigation, Equity Courts have an officer, called a Master in Chancery, to whom limited or specific issues may be referred.

GIBSON’S SUITS IN CHANCERY § 17.01 (8<sup>th</sup> Ed. 2004). It has long been recognized that courts have the power “to appoint a master to conduct fact-finding on matters that are complicated or that require special expertise, or to supervise judicial decrees . . . .” ROBERT BANKS, JR. & JUNE F. ENTMAN, TENNESSEE CIVIL PROCEDURE § 4-4(b) (2d ed. 2004); *see also Advance Lumber Co. v. Moore*, 148 S.W. 212, 212 (Tenn. 1912); 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2601 (3d ed. 2008); GIBSON’S, *supra*, §§ 17.02, 17.03.

In Tennessee, the use of special masters is governed by Rule 53 of the Tennessee Rules of Civil Procedure.<sup>8</sup> Unlike its federal counterpart, Rule 53 affords Tennessee trial judges broad discretion in the use of masters. *See* Fed. R. Civ. P. 53; *see also* BANKS & ENTMAN, *supra*, § 4-4(b).

The assignment, and thus the authority, of the special master is set forth in the trial court's order of reference, delineating the task the court is asking of him. While the master is given broad powers to carry out his assigned task, those powers ultimately are limited to the boundaries set forth in the order of reference. BANKS & ENTMAN § 4-4(d). In performing his assigned duties, the master

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**53.01. Appointment and Compensation.** – The court in which any action is pending may appoint a Special Master therein. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain the report as security for compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

**53.02. Powers.** – The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only, and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him or her and to do all acts and take all measures necessary or proper for the efficient performance of the duties under the order. The master may require the production before him or her of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may personally examine them and call the parties to the action and examine them upon oath. When a party so requests the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Tennessee Rule of Evidence 103.

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**53.04. Report.** – (1) CONTENTS AND FILING. The master shall prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) IN NONJURY ACTIONS. In an action to be tried without a jury the court shall act upon the report of the master. Within ten (10) days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6.04. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

is considered to be an officer of the court, subject to the code of judicial conduct. *See* 66 AM. JUR. 2D *References* § 23 (2001).

After performing the duties assigned, the special master will typically prepare a report for the trial court, setting forth his findings and recommendations. After the parties have the opportunity to object to the report, the trial court may adopt it, modify it, or recommit the matter to the special master with further instructions. *See* Tenn. R. Civ. P. 53.04(1) and (2); *see also* GIBSON's, *supra*, § 17.22 at 17-17 n.24.

As a parajudicial officer, the special master must be compensated for his service to the court. There are few Tennessee cases discussing a special master's compensation, and Rule 53 gives little guidance. Rule 53 notes only that the master is paid either by the parties or, if applicable, from a fund involved in the action, and states that the level of compensation is "fixed by the court."<sup>9</sup> Tenn. R. Civ. P. 53.01.

Federal Rule 53 likewise does not indicate how the federal district courts are to determine a special master's fee. *See* Fed. R. Civ. P. 53(g). Typically, special masters appointed by the federal district courts are compensated in accordance with the recommendations outlined by the United States Supreme Court in *Newton v. Consol. Gas Co. of N.Y.*, 259 U.S. 101, 105 (1922). *See* WRIGHT & MILLER, *supra*, § 2608. The *Newton* Court stated that a master

should be adequately remunerated for actual work done, time employed, and the responsibility assumed. His compensation should be liberal, but not exorbitant. The rights of those who ultimately pay must be carefully protected; and while salaries prescribed by law for judicial officers performing similar duties are valuable guides, a higher rate of compensation is generally necessary in order to secure ability and experience in an exacting and temporary employment which often seriously interferes with other undertakings.

*Newton*, 259 U.S. at 105 (citing *Fin. Comm. of Pa. v. Warren*, 82 F. 525, 527 (7th Cir. 1897)). The federal courts of appeal also use an abuse of discretion standard in reviewing the award of a master's fee. WRIGHT & MILLER, *supra*, § 2608.

In addition to federal caselaw on the compensation of a special master, we look to caselaw from other jurisdictions discussing the reasonableness of a special master's fee. In *Clark v. Finger*, 763 So. 2d 560 (Fla. Dist. Ct. App. 2000), the parties to a property dispute appealed the trial court's order awarding fees to a special master. *Clark*, 763 So. 2d at 561. The appellate court, applying an abuse of discretion standard, affirmed the award as reasonable. *Id.* at 561-62. To determine the reasonableness of the master's award, the *Clark* court stated that the relevant considerations were "the extent to which a master hears witnesses, examines and considers evidence, tries and determines

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<sup>9</sup>Rule 53 superseded Tennessee Code Annotated §§ 20-1401 through 20-1410. Tenn. R. Civ. P. 53 (2002) advisory commission comments. Unfortunately for the Appellants, Rule 53 did not retain the provision in the superseded statutes capping the compensation of special masters and other such referees at \$12.50 per day of service. *See* T.C.A. §§ 20-14022, 1404, 1410 (1955) (repealed 1972).

controverted questions of facts, investigates, determines controverted accounts, and makes reports of proceedings and results to the court.” *Id.* at 562 (citations omitted). The appellate court found that the “difficulty, intricacy, complexity and burden of the controversy” were important factors as well, and commented that the master’s compensation “should be commensurate with the master’s ability, experience and fitness . . . .” *Id.*

In *Crest Fin. Co. v. First State Bank of Westmont*, 248 N.E.2d 809 (Ill. App. Ct. 1969), the party against whom the master’s fees were assessed appealed the portion of the assessment that was not fixed by statute. *Crest*, 248 N.E.2d at 810. As in *Clark*, the lower court’s decision was reviewed for an abuse of discretion. *Id.* at 811. In affirming the award of the master’s fee, the *Crest* court capsulized the salient considerations: “The sum to be paid (a Master) should be based upon the time necessarily devoted to the work, the intricacy of the proof, and the complications of fact and law involved in preparing the report of his findings and conclusions.” *Id.* at 811 (quoting *Horan v. Blowitz*, 148 N.E.2d 445, 449 (Ill. 1958)).

For further guidance, we also look to Tennessee decisions involving the fees of other court-appointed officers, such as guardians ad litem. In *Keisling v. Keisling*, 196 S.W.3d 703 (Tenn. Ct. App. 2005), the guardian ad litem appealed the trial court’s refusal to award certain fees in a child custody case. The first trial judge appointed the guardian ad litem to determine, *inter alia*, any counseling or assessments needed for the children at issue in the case. *Keisling*, 196 S.W.2d at 726-27. Later, the first trial judge recused herself from the case. After assuming responsibility for the matter, the new judge “expressed uncertainty as to why the [guardian ad litem] was appointed.” *Id.* at 727. He indicated that he would consider her as an attorney ad litem. After the trial, the guardian ad litem filed a motion for her fees and the defendant mother objected. *Id.* Upon considering the mother’s objections, the trial court found that many of the tasks performed by the guardian ad litem were not within the duties of a guardian ad litem. *Id.* at 728. The mother’s objections to the guardian’s fee were sustained for two reasons: the guardian’s services “were of no assistance” to the court, and the guardian’s “services as counsel for the children were not compensable because the trial court had no authority to appoint counsel in a civil matter.” *Id.* at 731.

The appellate court reviewed the decision for an abuse of discretion. *Id.* at 726. The *Keisling* court noted, “In other jurisdictions, the reasonableness of a guardian ad litem’s fee has been determined by considering the same factors used in determining the reasonableness of attorney’s fees.” *Id.* at 729 (citations omitted). It found that the trial court appropriately considered the value of the guardian’s services to the court in setting her fee. The appellate court found, however, that the trial court erred in finding that there was no authority for compensating the guardian, either as a guardian ad litem or an attorney ad litem. It then vacated the trial court’s decision regarding the guardian’s fees and remanded the case to the trial court for reconsideration of the fee, with directions to consider the factors used to determine the reasonableness of an attorney’s fee. *Id.* at 731.

Against this backdrop, then, we consider the issues raised by the Lewis Appellants in this case, namely, (a) whether the hourly rate used to calculate the Special Master’s fee was excessive, (b) whether the trial court awarded fees for services not adequately described, and (c) whether the Special Master should have been awarded fees for performing work that was unauthorized in that it was outside the scope of the order of reference.

### A. Hourly Rate

The Lewis Appellants argue that the hourly rate used to compensate the Special Master should have been \$150 to \$200 per hour, in the range of other court-appointed officers such as guardians ad litem, rather than the \$275 to \$285 per hour utilized by the trial court. Noting that the standard of review is abuse of discretion, Chambers does not appeal the rate used by the trial court, conceding that it is “within the range of acceptable alternatives.” *Kaatrude*, 21 S.W.3d at 248. He points out, however, that he requested his normal rate of \$325 per hour, used in his private law practice.

As discussed above, trial courts are empowered to appoint special masters to handle a wide range of matters. Some may require, as in this case, the skills of a specialized corporate attorney. Others may require completely different specialized skills, including skills not normally associated with the practice of law.

The appropriate bounds are outlined by the United States Supreme Court in *Newton*, in which the Court states that the master’s compensation should be “liberal, but not exorbitant,” taking into account the rights of the parties, who are forced to pay for the master’s services, as well as the master, whose service to the Court may “seriously interfere” with his normal vocation. *Newton*, 259 U.S. at 105. It appears that the trial court in this case set an hourly rate that respected these bounds, declining to award Chambers the rate utilized in his commercial law practice, but nevertheless recognizing his specialized skills and the burden involved in his service. This is necessary “in order to secure ability and experience” in a special master. *Id.*

The trial court’s decision on the Special Master’s hourly rate was also based on a general consideration of the factors to be considered in determining a reasonable attorney’s fee, set forth in R.P.C. 1.5.<sup>10</sup> It focused in particular on the complexity of the matter, the rancor between the parties,

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<sup>10</sup>R.P.C. 1.5 lists ten factors to be considered:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

R.P.C. 1.5(a); *see also Connors v. Connors*, 594 S.W.2d 672, 677 (Tenn. 1980) (outlining similar factors to be used in determining a reasonable attorney’s fee).

and Chambers' professional reputation and qualifications.<sup>11</sup> In light of the fact that the skills needed by the special master were those of an experienced corporate attorney, we believe the factors used to set a reasonable attorney's rate were appropriate considerations in determining Chambers' hourly rate. *See Keisling*, 196 S.W.3d at 729-30; *Clark*, 763 So. 2d at 562; *Crest*, 248 N.E.2d at 465.

Moreover, the evidence in the record supports the trial court's findings that the skills of an experienced corporate attorney were needed and that Chambers' normal rates as a corporate attorney was at least \$325 per hour. From our review of the order of reference, the documents Chambers was asked to review, and the rest of the record, it appears that the issues involved were both complicated and bitterly disputed. Chambers submitted affidavits showing the customary rate charged by attorneys with his qualifications.

We recognize that the hourly rate used by the trial court was high, indeed. Under all of these circumstances, however, we must conclude that the Chancery Court did not abuse its discretion in awarding Chambers an hourly rate of \$275 for work performed in 2005 and \$285 for work performed in 2006.

### **B. Vague Description of Services in Report**

The Lewis Appellants challenge the fees awarded to Chambers for services described in the fee application as "attention to report." The total fees attributable to such services came to \$11,212.50. The Lewis Appellants contend that the Special Master's description of his services is insufficient, and that they should not have been ordered to pay those fees.

In awarding reasonable attorney's fees, courts look for an "adequate and sufficient description of the services rendered" in the attorney's fee application. *Anderson & Adams v. Bayou Land & Marine Contractors, Inc.*, 566 So. 2d 438, 441 (La. Ct. App. 1990); *see also In re Morgan*, 48 B.R. 148, 150 (Bankr. Md. 1985) (finding "telephone call to creditor" insufficient in the absence of a description of the identity of the creditor and the subject of the conversation). We think it appropriate that the same be required of a court-appointed officer such as a special master.

The Special Master's report filed by Chambers was nearly thirty pages long. It discussed the governing Tennessee law on corporations, LLCs, and the requirements for judicial dissolution, and set forth Chambers' findings and recommendations regarding a complex factual situation. The process of putting together such a report would necessarily be complicated and time-consuming. While "attention to the report" is indeed a cursory description of Chambers' time drafting the report to the trial court, in this case we must agree with the trial court that it would have been impracticable for Chambers to be highly specific in every time entry in his fee application that pertained to his preparation of the report. Accordingly, we find no abuse of discretion in the trial court's award of fees for these services.

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<sup>11</sup>The Lewis Appellants argue that the Chancery Court should not have relied on the antagonism and acrimony between the parties when setting the Special Master's fee because such factors are not explicitly listed in RPC 1.5(a). We take judicial notice of the fact that antagonism and acrimony make a matter more difficult for all involved, with the possible exception of the parties who are the most antagonistic and acrimonious. This argument is without merit.

### C. Scope of the Special Master's Authority

The Lewis Appellants also challenge the trial court's award of fees for work done by the Special Master which allegedly was outside the scope of the order of reference. Specifically, they contend that Chambers should not have been awarded fees for (1) reviewing the voting agreements, leases, and guaranties, and (2) acting as mediator to attempt to settle the parties' disputes. We discuss first the law regarding the scope of the Special Master's authority as it relates to the order of reference, and then analyze the two specific arguments raised on appeal.

The scope of a special master's authority is addressed in Rule 53.02 of the Tennessee Rules of Civil Procedure, which states:

The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only, and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. *Subject to the specifications and limitations stated in the order*, the master has and shall exercise the power to regulate all proceedings in every hearing before him or her and to do all acts and take all measures necessary or proper for the efficient performance of the duties under the order.

Tenn. R. Civ. P. 53.02 (emphasis added). Thus, Rule 53.02 provides for the master to "exercise broad powers in carrying out the order of reference, but also makes it clear that the master's authority is limited by the order." BANKS & ENTMAN, *supra*, at § 4-4(d) (citing *Albin v. Union Planters Nat'l Bank*, 660 S.W.2d 784, 786 (Tenn. Ct. App. 1983)). In advising courts on framing the order of reference to the special master, another commentator observes:

When practicable the powers and duties of the Master should be defined and he should be instructed, in a general way, what is required in each particular matter referred to him. The object of such rulings and directions is to narrow the range of inquiry, to point out to the Master the paths for him to pursue in his investigations, and thereby prevent the unnecessary accumulation of costs.

GIBSON'S, *supra*, § 17.06 (citing *Moore v. Churchwell*, 181 S.W.2d 959 (Tenn. Ct. App. 1944)).

While there is a dearth of Tennessee caselaw discussing the limits of a special master's authority, cases from other jurisdictions are instructive. In *Plumb v. State*, 809 P.2d 734 (Utah 1990), class counsel for a group of class action plaintiffs sought approval of a negotiated settlement which included an attorney's fee. *Plumb*, 809 P.2d at 736. In a December 6, 1988 interlocutory order, the trial court approved the settlement and awarded attorney's fees of \$5,800,000. *Id.* To determine the remaining issues, the trial court then appointed a special master "for the purpose of reviewing requests for cost reimbursements." *Id.* at 737. In addition to the task assigned in the order of reference, the special master reviewed the award of attorney's fees, and recommended a reduction in the amount of the fees. *Id.* In a second order, the trial court amended its December 6 order, expanding the special master's authority to include what the master had already done, i.e., review



the reasonableness of the attorney's fees. *Id.* at 737-38. In an October 31, 1989 order, in accordance with the special master's recommendation, the trial court amended its December 6 order to reduce the award of attorney's fees. *Id.* at 738. Class counsel appealed.

The Utah Supreme Court reviewed the trial court's decision, applying Rule 53(c) of the Utah Rules of Civil Procedure, which at the time was similar to Tennessee Rule 53.02. *Compare* Tenn. R. Civ. P. 53.02 *with* Utah R. Civ. P. 53(c). The *Plumb* court explained the "permissible scope of a master's authority":

The scope of the master's authority "may" be specified or limited by the order of reference. If so, the order of reference is "at once the chart and limitation of the master's authority." And the master should not exceed it *even with the consent of the parties*.

*Plumb*, 809 P.2d at 742 (quoting 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 53.06 (2d ed. 1990)) (emphasis added). In this case, the appellate court noted, the master "was not given a general reference to report on all the issues; he was directed to review requests for cost reimbursements." *Id.* The court found that, "[b]y investigating and reporting on the issue of attorney fees, [the special master] clearly exceed the scope of his appointment." *Id.* Commenting that the master is "bound by the ethical obligations and restraints of a judicial officer," the *Plumb* court noted other improprieties in the special master's mode of proceeding. *Id.* As a result, the appellate court vacated the October 31 order "insofar as it fixed an attorney fee award" and remanded for further proceedings. *Id.* at 745.

Similarly, in *Olson v. Idaho Dep't of Water Res.*, 666 P.2d 188 (Idaho 1983), the appellants argued that the special master acted outside the scope of the order of reference. In the underlying litigation, the Idaho Department of Water Resources filed a petition requesting an order commencing the adjudication of water rights in a particular area. *Olson*, 666 P.2d at 189. The trial court issued the requested order, and the department filed proposed findings of water rights in the area. *Id.* Several landowners, including the Olsons, objected to the proposed findings. The trial court referred these objections to a special master. *Id.* The order of reference authorized the special master to "hear . . . specific objections filed by the objectors" and to "make Findings of Fact and Conclusions of Law and do everything necessary to proceed to hear such objections." *Id.* at 190. During a preliminary meeting, at which the special master was not present, the parties "worked out an oral compromise agreement settling the contested water rights." *Id.* at 189. When the agreement was reduced to writing, the Olsons refused to sign. *Id.* The special master issued an order requiring the Olsons to show cause why he should not accept the written agreement without their signatures. *Id.* A hearing was held before the special master, after which he entered a decision adopting the agreement. *Id.* The Olsons objected to the special master's report. The district court nevertheless sustained the special master's findings and issued a decree in accordance with the written agreement. *Id.* The Olsons appealed. *Id.*

On appeal, the Idaho Supreme Court interpreted Idaho Rule of Civil Procedure 53(c), which is similar to Tennessee Rule 53.02. *Compare* Tenn. R. Civ. P. 53.02 *with* Utah R. Civ. P. 53(c). It observed initially that "the power of the master is determined by his order of reference, and he

possesses no power to hear controversies or perform acts outside the scope of the order.” *Id.* at 190 (citations omitted). Applying Rule 53(c) to the order of reference, the *Olson* court stated that the special master “was not empowered to resolve a contract dispute between the parties.” *Olson*, 666 P.2d at 190. It concluded that the case had to be reversed and remanded “because the action of the special master in determining a question outside the scope of the order of reference was an action in excess of his jurisdiction, and thus his report on that question should not have been accepted by the [trial court].” *Id.* at 189.

Having in mind the legal principles governing the scope of the Special Master’s authority as it relates to the order of reference, we now address the specific issues raised on appeal.

### **1. Review of Voting Agreements, Guaranties, Leases**

The Lewis Appellants argue that the Special Master went outside the order of reference in reviewing the shareholder voting agreements for South Street, Boundry, and Chumi, and in reviewing the guaranties and leases among the parties. As set forth above, the order of reference states that Chambers was to “investigate and report whether the requirements of T.C.A. 48-24-301(2)(A), (B) or (D) and/or the requirements of T.C.A. 48-245-901 . . . have been met” and “advise the [Chancery Court] on the necessity of judicial action to prevent future loss to the entities or the parties.” The trial court found that Chambers’ review of the voting agreements, guaranties and leases was within the scope of the order of reference.

Under Tennessee Code Annotated § 48-24-301(2)(A), the existence of director deadlock that the shareholders are unable to resolve is a circumstance that justifies judicial dissolution of the corporation. T.C.A. § 48-24-301(2)(A) (2002). In this case, a knowledge of the details and requirements of the voting agreements of the entities was relevant to the Special Master’s analysis of whether such a deadlock existed. Therefore, Chambers did not exceed the scope of the order of reference when he reviewed the voting agreements.

Likewise, Chambers’ review of the leases and guaranties was necessary to determine whether Chumi’s lease default would result in defaults of the South Street and Boundry leases. This was relevant to Chambers’ assigned task of determining whether the Chancery Court should take action to prevent future losses. Thus, his review of the leases and guaranties was also within the scope of the order of reference. Accordingly, we find no abuse of discretion in the trial court’s award of fees for Chambers’ review of the voting agreements, leases, and guaranties.

### **2. Mediation Efforts**

The Lewis Appellants also contend that Chambers’ attempt to mediate a resolution of the parties’ disputes was beyond the scope of the order of reference, and maintain that they should not be required to pay special master fees for his mediation efforts. The trial court implicitly acknowledged that mediation was not within the scope of Chambers’ order of reference, but stated that it was reluctant to “sanction” Chambers by denying his fee request for time spent on mediation because “the parties participated without objection” and mediation “is a preferable way of proceeding,” particularly in light of the parties’ acrimony. Therefore, even though Chambers’

mediation efforts were not within the scope of the matters referred to him, the trial court approved an award of fees for those efforts.

On appeal, Chambers likewise emphasizes that “no one objected at the time” to his efforts to facilitate settlement discussions. He insists that there was no abuse of discretion in the trial court’s fee award.

In this case, the order of reference is “at once the chart and the limitation of the Master’s authority,” not to be exceeded even with the consent of the parties. *Plumb*, 809 P.2d at 742. The Special Master “possesses no power to hear controversies or perform acts outside the scope of the order.” *Olson*, 666 P.2d at 190; *see also Best et al. v. Pike*, 67 N.W. 697 (Wis. 1896) (“[T]he referee’s powers are limited by his order of appointment, and are not to be enlarged by implication or consent of the parties.”). It is clear in this case that Chambers’ efforts to facilitate a settlement of the parties’ disputes were outside the scope of his order of reference.

Can the trial court in effect ratify the Special Master’s actions outside the scope of its order of reference by approving them after the fact? Was it an abuse of discretion in this case for the trial court to do so?

The Utah Supreme Court was faced with a similar situation in *Plumb*, and was clearly troubled by the trial court’s “attempt[] to retroactively expand the scope of the master’s referral to cover what was actually done.” *Plumb*, 809 P.2d at 742. The appellate court found particularly disturbing the fact that the parties were not given advance notice of the issue to be addressed by the master, depriving them of the opportunity to prepare and fully participate in advance of the master’s decision. For that reason, the *Plumb* court declined to reach the issue of whether the trial court’s “attempt at retroactive expansion might be effective under some circumstances,” and instead held that the trial court abused its discretion in adopting the findings of the special master on an issue not within the scope of the order of reference. *Id.* at 742-43.

Here, the Special Master did not report to the trial court on his mediation efforts, except to indicate that they were unsuccessful. While we agree with the sentiments expressed in *Plumb*, particularly the court’s discomfort with the trial court’s attempt to expand retroactively the scope of the special master’s authority,<sup>12</sup> we find the Chancery Court’s decision troubling for different reasons, as explained below.

It is particularly tempting for a special master or other court-appointed officer (such as a guardian ad litem, referee, and the like) to attempt to facilitate settlement discussions among the parties. The special master is a neutral, operating in a parajudicial capacity, and is typically an attorney in whom the trial judge has confidence. In the course of performing the task assigned in the order of reference, the special master becomes familiar with the issues in the case and interacts informally, usually outside of the courtroom, with the parties and their attorneys. If the case is

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<sup>12</sup>As in *Plumb*, we are troubled by the retroactive expansion of the Special Master’s authority in this case, but recognize that it may be effective under some circumstances. *Plumb*, 809 P.2d at 742-43.

settled, all disputes go away, and the trial judge who appointed the special master is sure to be appreciative.

Having the special master attempt to act as a mediator, however, while at the same time investigating and preparing a report to the trial court on other issues, is especially problematic. The special master *qua* judicial officer is expected to report findings and conclusions to the trial court on issues that are important, perhaps even pivotal, to the outcome of the case. Conversely, in the capacity of mediator, the special master is required to “treat all information related to the dispute as if it were information protected by Rules [of Professional Conduct] 1.6 and 1.8(b).” Tenn. Sup. Ct. R. 8, R. of Prof’l Conduct 2.4(c)(4); *cf.* Tenn. Sup. Ct. R. 31 §§ 2(c), 10(d). Thus, the Rules of Professional Conduct require that the mediator protect information related to the dispute as confidential and refrain from using that information to the disadvantage of the parties to the mediation. The purpose of Rule 2.4 is obvious. During the course of mediation, the parties must necessarily engage in frank discussions with the neutral on the strengths and weaknesses of their case. Moreover, in many mediations, one party or another may be resistant or at least less receptive to settlement. In a “stand-alone” mediation, the parties can be confident that the judge will not be influenced by either their concessions to the mediator regarding the weaknesses in their positions or by the mediator’s perception of them as cooperative or uncooperative in the settlement discussions, because the judge will not be privy to this information. This is not the case if the mediator is a special master, guardian ad litem, or other court-appointed officer who is charged with reporting to the trial court on substantive issues in the case.

The trial court noted that the parties “participated without objection” in the settlement discussions conducted by the Special Master, and Chambers relies heavily on this fact in his argument on appeal.<sup>13</sup> Under the circumstances of this case, the parties’ apparent acquiescence in the Special Master’s mediation efforts does not cloak the Special Master with the authority to conduct settlement discussions. Again, in a typical mediation, the parties have the opportunity to select, or at least veto, a proposed neutral without fear of the consequences. Where, however, the special master, in the course of investigating the issues assigned to him, proffers his services as a mediator, or even where one party suggests that he act as mediator, the situation makes it difficult for the other party to object without fear of biasing the special master against the other party’s position. Similarly, it is typically inappropriate for a trial judge to attempt to mediate a case that is before him, no matter how confident the trial judge may be that his ultimate disposition of the case

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<sup>13</sup>In their response in opposition to Chambers’ motion to approve his application for fees, however, James Lewis and Lewis Investments stated that they initially agreed to allow mediation efforts, but later asked that such efforts be terminated, to no avail.

would not be influenced by the mediation discussions.<sup>14</sup> Thus, however well-meaning the special master is, his mediation efforts place the parties in an uncomfortable situation.<sup>15</sup>

Here, the Special Master engaged in mediation efforts that were clearly beyond the scope of the order of reference. As noted by counsel for the Lewis Appellants at oral argument on appeal, the fact that the Special Master was assigned to report to the trial court on pivotal issues in the case made it problematic for the Lewis Appellants to object to his efforts without fear of biasing either the Special Master or the trial judge against their position in the case. Under these circumstances, regardless of the parties' failure to object at the time, we must conclude that the trial judge abused his discretion in requiring the parties to pay for the Special Master's time spent on mediation. The Special Master's fee award must be reversed insofar as it requires the Lewis Appellants to pay fees for the Special Master's time spent on mediation. Because the Pennington Group is not a party to this appeal, we remand the cause to the trial court for calculation of the amounts to be subtracted from the Special Master's fee award as to each of the Appellants.

### CONCLUSION

In conclusion, we reverse the trial court's decision as to the Lewis Appellants insofar as it awarded fees to Chambers for his time spent on mediation and settlement discussions with the parties. We affirm the remainder of the decision. The cause is remanded for further proceedings consistent with this Opinion. The costs of this appeal are taxed one-half to the Appellants Bradford Jason Lewis, Ginger Lewis Dollarhide, James Bryan Lewis, James A. Lewis, and Lewis Investment Co., Inc., and one-half to the Appellee John L. Chambers, for which execution may issue if necessary.

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HOLLY M. KIRBY, JUDGE

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<sup>14</sup>This is in contrast with a trial judge discussing with the parties the possibility of settlement and whether alternative dispute resolution is appropriate, as in a pretrial conference. *See* Tenn. R. Civ. P. 16.03(7).

<sup>15</sup>It is not inappropriate for a trial court to appoint a special master or other referee for the express purpose of conducting settlement discussions, particularly if mediation is the special master's only assigned task. However, if the special master is to be assigned other duties, his other duties should be concluded before mediation efforts begin, and the parties should have the opportunity, after the special master has completed his other duties for the trial court, to object to having the special master act as mediator.